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In the Supreme Court of the United States.

No. 197.

October Term, 1906.

Office Supreme Court
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JAMES H. McKEN

The Cleveland Electric Railway Company,
APPELLANT,

vs.

The City of Cleveland, Et Al.,
APPELLEES.

Brief for Appellant.

WILLIAM B. SANDERS,
ANDREW SQUIRE,
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STATEMENT.

I.

The appellant appeals from the decree of the Circuit Court for the Northern District of Ohio, entered December 4th, 1905.

The case was heard upon the bill, answer, replication, and testimony, appearing in the Record.

As appears from the Amended Bill of Complaint (Record, page 107), the complainant below filed its bill against the appellees seeking to have declared void an ordinance of the City of Cleveland passed January 11th, 1904, and granting to The Forest City Railway Company the right to maintain and operate a line of street railroad in Erie Street and Central and Quincy Avenues in the City of Cleveland. This relief is asked in the bill upon the ground that the complainant, under existing contracts between it and the City of Cleveland, evidenced by ordinances of the city council, is operating a line of

street railroad on the streets named in said ordinance of January 11th, 1904; that the right of the complainant does not expire until 1914; and that the legislative act of the city council seeking to transfer these street railroad routes to the Forest City company is an impairment of the existing contract rights of the complainant.

The ordinance of January 11th, 1904, attacked in the bill, appears in the Record at page 244, and is entitled:

> "An ordinance granting to The Forest City Railway Company, its successors and assigns, the renewal right to maintain and operate the existing street railroads in the following streets: Commencing at the intersection of Prospect and Erie streets in the City of Cleveland, State of Ohio; thence southerly on, over and along Erie Street to Central Avenue; thence easterly on, over and along Central Avenue to Lincoln Avenue; also commencing at the intersection of Quincy Street with Willson Avenue in said city; thence easterly on, over and along Quincy Street to Woodland Hills Avenue."

CENTRAL AVENUE WAS FORMERLY GARDEN STREET, and the ordinance attacked in the bill conferred upon The Forest City Railway Company a right to occupy and use the Garden Street extension route operated by the appellant.

The Circuit Court refused the relief asked, because it held and decreed (Record, page 276) that the right of the complainant to maintain and operate its railroad upon the streets in controversy expired on the 22nd day of March, 1905.

The bill also charges that the ordinance attacked is invalid on another ground, namely: The ordinance recites that the rights of the complainant will expire on the 22nd day of March, 1905, and undertakes to grant to the Forest City Company, the appellee, a renewal of the rights of the complainant; in other words, seeks to renew a grant in favor of a stranger to the granting contract.

APPELLANT'S CONTENTION RESTS UPON THE FOLLOWING FACTS:

(A) The lines of railroad track involved in this cause are known and appear in the Record as the Garden Street or Central Avenue lines, and are extensions of the main line of The East Cleveland Railroad Company. The franchise to operate this "main line" does not expire until January 13th, 1913 (Record, page 219, 220, Sec. 6).

(B) By express provisions of ordinances, the City has granted to appellant the right to operate these Central Avenue or Garden Street extension tracks until the expiration of the grant for the "main line," namely: July 13th, 1913 (Record, pages 211-227-228).

(C) By ordinance of 1894 council provided for the construction and operation of a cross-town line upon Willson Avenue by the appellant, compliance with which requires the operation of the Central Avenue or Garden Street lines involved in this action until 1914; and this last-mentioned ordinance grants the rights thereby conferred until July, 1914 (Record, page 235 at 237, Sec. 10).

(D) As respects all of these extension grants, the City received adequate consideration in improved service by way of rapid transit facilities, and obtained for the public a reduction of fare in that passengers were thereafter carried longer distances for one fare and given the benefit of a liberal transfer system; and the period of extended grant in no case exceeded nine years.

II.

The facts supporting the foregoing statements appear in the Record, and are as follows:

The complainant, The Cleveland Electric Railway Company, is a consolidated street railway company formed by the consolidation of the several constituent companies, namely: The East Cleveland Railroad Company, which was operating a line of railway on Prospect Street, Euclid Avenue, Wade Park Avenue, Central Avenue (formerly Garden Street), Cedar Avenue, and various extensions; The Broadway & Newburgh Street Railroad Company, which was operating a line of railroad from Newburgh to the central part of the city; The Brooklyn Street Railroad Company, which was operating from the south side of the city to the Public Square, and thence to the southeasterly portion of the city; and The South Side Street Railroad Company, which was operating a line of railway from the south side of the city through Scranton and Jennings Avenues.

Since this consolidation the company has been, and now is, operating a system of railway, giving through car service and general transfers, over two hundred and thirty-six miles of track, and it is conducting this operation under grants from the City of Cleveland made to the respective companies which entered into this consolidation and The Cleveland City Railway Company.

The complainant is also the owner, by purchase, of all the tracks and franchises of The Cleveland City Railway Company.

The line of road particularly involved in this case was constructed and is now in operation under a grant made to The East Cleveland Railroad Company.

In the amended bill (Record, page 107) is set out chronologically a history of all of the ordinances and grants pertaining to the lines of The East Cleveland Railroad Company, and in the Record will be found copies of all the ordinances pertaining thereto.

To the end that the Court may be at once advised as to the particular ordinances here involved, we shall confine this statement to the ordinances and grants which we conceive to be ultimately controlling in determining the right of the complainant to a reversal of the decree from which it has appealed.

III.

MAIN LINE OF THE EAST CLEVELAND RAILROAD COMPANY.

The charter of the East Cleveland company (Record, page 259) shows that the company was organized

> "*for the purposes of constructing, equipping and maintaining a railroad, commencing at the intersection of the Euclid and Newburgh roads at Doan's Corners in said Township of East Cleveland, and running thence westerly to and into the City of Cleveland, in said County of Cuyahoga, and terminating at or near the Southwesterly corner of the Public Square.*"

Between the chartered termini the company, by permission of the council, in 1859 and 1860 (Record, pages 182, 184 and 185), located and constructed its line from Willson Avenue through Euclid Avenue to Case Avenue; through Case to Prospect Street; Prospect to Erie Street, and thence to the Public Square. This was the "main line" of the company, and in all subsequent legislation by the city council has been so recognized. This appears in the following, among other, legislative acts subsequent to 1859.

In 1868 (Record, page 188) the chartered line at that time having been constructed, the council authorized the Garden Street extension, and, in so authorizing it, recognized the "main line" of the company by providing that the extension should be built *"to connect with the main line of its railroad"*; and also in the further provision that, in the operation of this extension, the company shall have the right

> *"to continue to use and occupy the streets, avenues and public grounds over which its main line is now constructed and operated, westerly from the junction of said road with the main line to its westerly terminus."*

Again, an agreement between the Village of East Cleveland and the East Cleveland Company (Record, page 194), providing for a portion of the construction in the then township of East Cleveland, authorized an extension which is described as *"being an extension or branch of its main road located in the City of Cleveland;"* and this was an extension of the chartered line of the company.

Again, on March 25th, 1873 (Record, pages 199-200 and Map), was passed a resolution which referred to the laying of new tracks by the company, and the "main line" as the chartered line of the company is referred to in the grant, which is, in substance, *"to lay a double-track street railroad in Ohio Street * * * to connect with their main track at this point."*

Again, on May 23rd, 1876 (Record, page 202), in legislating as to an extension of tracks upon Garden Street, authority is given to equip and operate said extension *"in connection with said branch and its main line."*

Again, in 1885 (Record, page 211 and Map), in an ordinance pertaining to an extension of the Garden Street lines, authority is given to equip and operate said extension *"in connection with said branch and its main line."*

In 1887 (Record, page 217), authority is given for a further extension in Garden Street, and authority to operate it *"in connection with said branch and its main line."*

On July 13th, 1888 (Record, page 219), in an ordinance granting the East Cleveland company the right to operate on Euclid and Cedar Avenues by electricity, the Euclid Avenue line is expressly recognized as the "main line" in section 6 of the ordinance, which provides that the grant therein made shall be void unless a satisfactory electrical system is extended over *"their entire main and Cedar Avenue lines within eighteen months."*

May 13th, 1889 (Record, page 222), the Euclid Avenue or chartered line is recognized as the "main line" in a resolution requiring the company to extend its electrical system, and in this resolution it is recited:

> "Whereas, * * * it is stipulated that the East Cleveland Company shall, whenever required by the council, use the same system of motive power on the entire length of its main and Cedar Avenue lines * * *.
>
> "And Whereas, the use of electricity as a motive power on such railroad has fully demonstrated its practicability and necessity, * * *;
>
> "Resolved, That the East Cleveland company be, and it is hereby, authorized and required, as soon as practicable, to extend the use of such motive power over its MAIN and Cedar Avenue lines to the westerly termini thereof."

February 20th, 1882 (Record, page 261), an ordinance was passed permitting The East Cleveland Railroad Company to extend its line of railroad on Hayward and Cedar Avenues, the grant being

> *"to extend its line of railway from the present track at the intersection of Prospect Street and Hayward Street * * * and to equip and operate said extension * * * in connection with its main line and terminating with the grant for the main line."*

Again, on July 21st, 1884 (Record, page 263), another ordinance was passed relating to an extension of the Cedar Avenue extension, which is here called the Cedar Avenue branch of its railway. The grant here is

> *"to extend the Cedar Avenue branch of its railway from the termination of its present track * * * and equip and operate said extension as a single track railroad in connection with said branch and its main line, and terminating with the grant for the main line."*

Again, September 9th, 1887 (Record, page 264), a grant is made to The East Cleveland Railroad Company to lay a double-track railroad in Perry Street and Cedar Avenue; this being a further extension of the Cedar Avenue line; and it is there provided that

> *"the rights herein granted shall terminate at the expiration of the present charter for the said company's main line."*

February 24th, 1888 (Record, page 266), an ordinance was passed for an additional track in Cedar Avenue, and it is there provided that

> *"The right herein granted shall be valid until the expiration of the grants for the said company's main line."*

Again, October 13th, 1890 (Record, page 267), another ordinance was passed with reference to an additional track upon the Cedar Avenue extension, and it is here provided:

> *"And the rights herein granted shall expire with the grants for the said company's main line; that is, July 13th, 1913."*

Again, April 12th, 1889 (Record, page 269), an ordinance was passed authorizing the East Cleveland Company to extend its street railroad in what is known as Wade Park Avenue. By section 4 of this ordinance provision is made as to the rate of fare over the "main line" and extension; and in section 5 it is provided:

> *"The extension of said double-tracks and appliances as herein provided for shall terminate with the present grant for said East Cleveland Railroad Company's main line."*

IV.

GARDEN STREET EXTENSION 1868.

The "main line" of the East Cleveland Company, being as above stated, on *January 14th*, 1868 (*Record, page* 188), such company was authorized to construct and operate, in connection with its "main line," an extension or branch line connecting with the main line of its road at the intersection of Prospect and Brownell Streets; thence to Garden Street (now Central Avenue); and thence easterly along the center of Garden Street to Willson Avenue, to the easterly boundary of said city. (*See Map, page* 188.) This last-mentioned grant is the original grant under which the Garden Street extension (now Central Avenue) was constructed. The grant by its terms was to continue during the period of twenty years; that is to say, until January 14, 1888; and, as part of this grant, the company was to operate this extension in connection with the "main line" and

"to continue to use and occupy the streets, avenues and public grounds over which its main line is now constructed and operated westerly from the junction of said road with the main line to its westerly terminus for the same length of time."

It is to be observed here that the original grant for the construction of this road was for and as an extension of the "main line" and to be operated in connection with the "main line," and that a portion of the territory which the grant authorized to be used at that time comprised a portion of the "main line."

V.

In March, 1868, the Village of East Cleveland granted to the East Cleveland Company the right to extend its Garden Street tracks through the Village of East Cleveland, then adjoining the city on the east, through portions of said Village of East Cleveland; and, under this grant from the Village of East Cleveland, this Garden Street or Central Avenue extension of the "main line" of the East Cleveland Railroad Company was extended easterly from Willson Avenue in East Cleveland Township. This township long since became part of the City of Cleveland. (Record, page 190.)

VI.

EXTENSION OF 1873 IN ERIE STREET.

On March 25th, 1873 (Record, pages 199-200 and Map), the council, by resolution, granted to the East Cleveland Company the right to lay a double-track street railroad intersecting with its main line at Erie and Prospect streets; thence through Erie to Ohio Street, and through Ohio to Garden Street (now Central Avenue), connecting with the Garden Street extension at that point. This resolution was complied with, and the

Garden Street line thereby became an extension of the "main line" intersecting at Prospect and Erie Streets; running thence through Erie to Ohio Street; thence through Ohio to Garden Street; Garden to Baden Street; and Baden to Quincy Street. The company was required to operate said Garden Street line in connection with its "main line" and run its cars through Erie Street to Euclid Avenue; Euclid Avenue to and around the Public Square to Superior Street, and through Superior to Water Street; so that it is to be noted that the operation contemplated and required, with respect to the Garden Street extension, involved necessarily a portion of the "main line" from Erie Street westerly.

VII.

EXTENSION OF 1876.

In 1876 (Record, page 202, and Map following), the East Cleveland Company was authorized by the council, acting under section 2505 of the Revised Statutes, to extend its Garden Street tracks from their then terminus at Baden Street to Quincy Street, and along Quincy Street to New Street, and along New Street to Garden Street; and in and by this ordinance it is provided that the company is

> *"to equip and operate said extension for twenty years in connection with said branch and its main line, but with the express condition that no increase of fare shall be charged by said company on any part of its said branch or of its main line or of said extension by reason of said extension."*

It will here again be noted that the right and obligation to operate this Garden Street extension was made to continue with the "main line," portions of which "main line" it was required to use in such operation; and the period fixed for such operation is twenty years from May 23rd, 1876, or May 23rd, 1896.

VIII.

MAIN LINE RENEWAL OF 1879.

On September 15th, 1879, a general renewal of franchises was granted to the East Cleveland Company as respects its "main line" (See Record, page 204 and Map). This ordinance does not in terms specifically refer to the Garden Street extension. It does, however, describe a portion of the tracks over which the company was required to operate its Garden Street extension; hence it is apparent that, unless there is other legislation inconsistent with such construction, it must be held that this general renewal ordinance of 1879 included the operation of the Garden Street extension; and under this general renewal the company was authorized to operate the lines therein referred to until September 20th, 1904.

IX.

GARDEN STREET EXTENSION OF 1880.

On March 22nd, 1880, an ordinance was passed entitled:

> "An ordinance to permit The East Cleveland Railroad Company to extend the Garden Street branch of its railway."

(Record, page 208 and Map following.) The permission here granted is

> *"to extend the Garden Street branch of its railway from the present track at the intersection of Baden Street and Quincy Street in an easterly direction on and along said Quincy Street to the intersection of Lincoln Avenue, and to equip and operate the said extension and its Garden Street branch for the period of twenty-five years from and after the passage of this ordinance."*

It is to be observed that this is an ordinary provision for the extension of track, and provides, in legal effect, that the tracks as so extended may be operated for the period of twenty-five years from March 22nd, 1880; that is to say, to March 22nd, 1905.

It is to be noted that the general renewal ordinance of 1879 had extended the rights of the company to September 20th, 1904, and apparently this ordinance extends its right, as respects Garden Street, to a period six months later, namely: March 22nd, 1905; but it is apparent that at this time the rights for the "main line" and this extension expired substantially at the same time.

X.

EXTENSION OF 1885.

In 1885 (Record, page 211 and Map) the company was again authorized to extend the Garden Street branch of its railway from the intersection of Quincy Street and Lincoln Avenue in an easterly direction to Woodland Hills Avenue: the ordinance providing that such extension should be operated

> *"in connection with said branch and its main line, and terminating with the grant for the main line, but with the express condition that no increase of fare shall be charged by said company on any part of its main line or on said extension by reason of said extension."*

XI.

EXTENSION OF 1887.

In 1887 an ordinance was passed to permit the company to further extend the Garden Street branch (Record, page 217); in this instance the ordinance providing that the

extension should be

> *"from the intersection of its present track with Baden Street upon Garden Street in an easterly direction along and upon said Garden Street to the easterly line of Lincoln Avenue; and equip and operate said extension as a single or double track railroad, with all necessary switches, turnouts, and turn tables, as per plan on file in the office of the Board of Improvements, in connection with said branch and its main line, and terminating with the grant for the Garden Street main line."*

Here it is to be observed that the operation is to be an operation in connection with the "main line."

XII.

MAIN LINE EXTENDED TO JULY 13, 1913.

On July 13, 1888 (Record, page 219, and Map following), the council granted to the East Cleveland Company the right to change its motive power upon certain portions of its lines, including its "main line," to electric power, and in this ordinance it is provided that, in consideration of the large expenditure involved in such change and of the improved facilities to be afforded the public, the grant to the company upon its "main line" and its Cedar Avenue line shall be and continue in force for twenty-five years from and after the passage of said ordinance. This ordinance having been accepted and complied with by the East Cleveland company, *the expiration of the company's right to operate its main line was expressly extended to July* 13, 1913.

XIII.

GRANT TO USE ELECTRICITY IN GARDEN STREET.

On March 10, 1890 (Record, page *225* and Map), an ordinance was passed authorizing the substitution of electrical motive power upon the Garden Street extension; that is, upon this extension of the "main line," which had then been extended to July 13, 1913. In this ordinance it is provided that the right to operate the said Garden Street extension of said "main line" by electricity should continue during the term of the company's grant for the operation of tracks upon Garden Street. As already shown, it appears that the right to operate tracks upon Garden Street terminated at the same time with the right of the company to operate the "main line," of which Garden Street was an extension, and the right to operate the "main line" had been extended to July 13, 1913.

XIV.

GRANT IN GARDEN STREET EXTENDED TO TERMINATE WITH "MAIN LINE," JULY, 1913.

On March 30, 1891 (Record, page *227* and Map), the council passed an ordinance granting to the East Cleveland Railroad Company

> *"the right to construct and operate a second or additional track upon Central Avenue from the east line of Willson Avenue to the right of way of the Cleveland & Pittsburgh R. R. Co."*

This is an ordinance completing a double track system upon Garden Street, and, by section four thereof, it is provided:

> "4. *The right herein granted shall be valid until the expiration of the grants for the said company's main line.*"

The grants for the company's "main line" did not expire until

July 13, 1913; so that this last mentioned ordinance is an ordinance in express terms authorizing the operation upon Central Avenue to contiue

"until the expiration of the grants for the said company's main line."

XV.

GRANT IN GARDEN STREET DECLARED TO RUN UNTIL JULY 13TH, 1913.

On April 20, 1891 (Record, page 228 and Map), an ordinance was passed, entitled:

> "An ordinance to grant the East Cleveland Railroad Company permission to lay an additional or second track in Quincy street from New street to Woodland Hills avenue."

This route is part of the Central Avenue route and, with respect to the expiration of the grant to so operate the Garden or Central Avenue route as so extended, this ordinance provides, in section 3, as follows:

> *"The right herein granted shall be valid until the expiration of the grants for said company's tracks on said Quincy street east of Lincoln Avenue, to-wit: July 13, 1913."*

Here it is to be observed the council again expressly authorized the continuation of the operation of this Central Avenue extension until July 13, 1913, being the date of expiration of the "main line" of the company as hereinbefore shown.

XVI.

CONSOLIDATION FORMING APPELLANT.

In May, 1893, was made the consolidation making up the complainant company; and the council, acting under authority of statute, fixed the terms and conditions upon which

such consolidation might be made effective (Record, page 230 and Map following). The dates of expiration of the franchises of the companies entering into this consolidation were as follows: *The East Cleveland Railroad Company*, 1913; *The Broadway and Newburgh Street Railroad Company*, 1914; *The Brooklyn Street Railroad Company*, 1910; and *The South Side Street Railroad Company*, 1913. Under the terms and conditions of the consolidation as fixed by the council, the company was required thereafter to operate all of the lines as one entire system and to adopt a general system of transfers.

XVII.

PROVISION FOR CONTINUED OPERATION ON GARDEN STREET WITH MAIN LINE.

In July, 1893, following the consolidation just referred to, the council passed an ordinance (Record, page 232 and Map following), entitled:

> "An ordinance granting The Cleveland Electric Railway Company the right to extend and operate its double track street railroad in Prospect street from Erie street to Ontario street, and along certain parts of Seneca, Lake and Ontario streets."

This ordinance requires the company to comply with all the terms and conditions of the resolution of May 29, 1893, fixing the terms and conditions of the consolidation forming the complainant, and gives to the council the right to require the company to operate all of its cars over the entire length of any of the lines or extensions over the loop provided for. It also requires the company to operate night cars over the entire length of its line, an obligation not before imposed; also imposing upon the company the expense of sprinkling in addition to that required by existing ordinances; and obligating the company, in consideration of the grant, to agree that all the terms and provisions of the section relating to additional bur-

dens should apply to and be conditions of all the grants theretofore made by the council to the constituent companies or any of them. And in this ordinance it is provided (Sec. 6) that the grant therein made "*shall be in force until the 13th day of July, 1913.*" This ordinance relates to a portion of the line originally constructed as part of the Garden Street extension. It requires the operation of all the Garden Street cars over these tracks, so that in this ordinance the council legislated as to the operation of the tracks upon Garden Street and provided that such operation should continue until July 13, 1913.

XVIII.

CROSS-TOWN LINE REQUIRING OPERATION OF GARDEN STREET LINE UNTIL 1914.

On February 14, 1894 (Record, page 235, Map, page 238), an ordinance was passed establishing what is known as the cross-town line upon Willson Avenue. It is entitled:

> "An ordinance granting permission to The Cleveland Electric Railway Company and The Cleveland City Railway Company to extend their tracks in Willson Avenue."

By the terms of this ordinance, the companies were required to build and equip a double track, electric street railway along Willson Avenue from Broadway to the northerly terminus thereof. A portion of this road was to be built by The Cleveland City Railway Company and the other by the complainant company. By section five of this ordinance, it is provided that the operation of cars on said railway shall be under the control and regulation of the council; and by section six, in substance, it is provided that passengers on any car operated on any part of said Willson Avenue, upon the payment of one fare, shall be entitled to be transferred to any other line of either said The Cleveland Electric Railway Company or the Cleveland City Railway Company intersecting or coming to

Willson Avenue, and with the additional right to transfer from such second line to a car on any other line of the company operating the same which crosses the Cuyahoga River; and providing that passengers on any line of either of said companies intersecting or coming to Willson Avenue shall be entitled to transfer to Willson Avenue and have a continuous ride thereon.

By section ten of this ordinance, it is provided that this *grant shall be in force until the 1st day of July*, 1914.

The lines involved in this action intersected and crossed Willson Avenue at two points, so that, under the provisions of this ordinance, the railway company was obligated to operate this cross-town line and provide this system of transfers up to the first day of July, 1914, as respects all of the tracks involved in this action.

XIX.

OPERATION REQUIRED UNDER CONSOLIDATION.

Prior to the consolidation which formed the complainant, the various constituent companies operated independent lines of street railroad. There was little, if any, interchange of traffic between the roads, and the public were required, with few unimportant exceptions, in patronizing said lines and desiring to take passage on another line, to pay an extra fare. The council having, upon May 29, 1893, prescribed the terms and conditions upon which such consolidation might take place, and such terms and conditions having been accepted by the complainant, the complainant has, under the obligations of such action of the council, from that time to the present operated its lines as one system; only one fare being charged for a continuous ride on or over any line of railroad formerly owned by said constituent companies and any line of any other of said constituent companies within the limits of the city; and has also been required to give, and has given in its operation, transfers from one line to another for a single fare.

ERRORS ASSIGNED.

The appellant assigns as error,—

(1) It was error in said Circuit Court to adjudge and decree that the right of the complainant to operate its street railroad upon the street railroad route described in the ordinance of the City of Cleveland passed January 11th, 1904, expired on the 22nd of March, 1905.

(2) It was error in said Circuit Court to adjudge and decree that the right of the complainant to operate its street railroad upon the Central Avenue route in the bill of complaint described expired on the 22nd of March, 1905.

(3) It was error in said Circuit Court to refuse to adjudge and decree that the ordinance of January 11th, 1904, set forth in the bill of complaint, impaired the contract rights of the complainant with the City of Cleveland, in this respect: That whereas, complainant was by contract authorized to maintain and operate its Central Avenue street railway route until at least July 13th, 1913, said ordinance of January 11th, 1904, deprived the complainant of the exercise of such right, and undertook to terminate its right of operation of said Central Avenue route on the 22nd of March, 1905, and was therefore null and void.

(4) It was error in said Circuit Court to refuse to adjudge the ordinance of January 11th, 1904, set forth in the bill, void, because it was an ordinance purporting to renew to The Forest City Railway Company a grant which, at the time of said attempted renewal, belonged to the complainant.

(5) It was error in said Circuit Court to adjudge that one-half of the costs should be paid by the complainant.

Argument.

I.

THE CASE WAS PLAINLY WITHIN THE JURISDICTION OF THE CIRCUIT COURT.

Cleveland v. Cleveland City Ry. Co., 194 U. S. 517,
Cleveland v. Cleveland Electric Ry. Co., 201 U. S. 529.
City Ry. Co. v. Citizens Ry. Co., 166 U. S., 357.

II.

THE FACTS ALLEGED IN THE BILL ENTITLE APPELLANT TO RELIEF IN EQUITY.

Cleveland v. Cleveland City Ry. Co., supra,
Cleveland v. Cleveland Electric Ry. Co., supra,
Iron Mountain R. R. Co., v. Memphis, 96 Fed. 131,
Walla Walla v. Walla Walla Water Co., 172 U. S., 1 at 12.

If admission could add anything to the foregoing authorities on the subjects both of jurisdiction and equitable relief, it could be found in the cross-appeal with the assignments of error herein made by the appellees. (Record 283, 284).

III.

COMPREHENSIVE POWER CONFERRED UPON CITY COUNCILS BY OHIO STATUTES WITH RESPECT TO STREET RAILWAYS

By section 3443 of the Ohio Statutes it is provided,—

> "Council or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such railways may be constructed, operated, extended and consolidated."

Speaking of the power conferred upon city councils by the Ohio Statutes, this Court, in *Cleveland v. Cleveland City Railway Co., supra,* say:

> "The statutes show that there was lodged by the legislature of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended and consolidated; the only limitation upon the power being, that in case of an extension or a consolidation, no increase in the rate of fare should be allowed."

By section 2502 of the statutes there is a limitation upon the power of the council as to the period for which grants shall be made, and it is there provided:

> "No grant or renewal of any grant for the construction or operation of any street railroad shall be valid for a greater period than twenty-five years from the date of such grant or renewal."

By section 2501 it is provided:

> "The council may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interest."

In *Cleveland v. Cleveland City Ry. Co., supra*, this Court, following the ruling of the Supreme Court of Ohio in *Hadden ex rel. v. East Cleveland R. R. Co.*, 6 Ohio Circuit Reports, held that the renewal power conferred by section 2501 may be exercised at any time prior to the expiration of the grant and upon a finding by the city council that its exercise is conducive to public interest.

EXTENSIONS OF TRACK.

Special provision is made by the Ohio statutes as to the power of the council to authorize the extension of existing tracks, and, by section 2505, it is in substance provided that:

> "The council of any city or village may grant permission by ordinance to any corporation, individual or company owning or having the right to construct any street railroad, to extend their track * * * in any street or streets where council may deem such extension beneficial to the public * * *."

Of this statute and the exercise of power thereunder by city councils, the Supreme Court of Ohio, in *Sims v. Street Railroad Co.*, 37 O. S. 556, say:

> "The exercise in good faith by the council of a city or village of the discretion vested in it by section 2505 of Revised Statutes (as corrected 77 Ohio Laws, 42), to grant permission to any corporation, company or individual, owning or having the right to construct a street railroad, to extend its track, where the council may deem such extension beneficial to the public, will not be interfered with by the court."

Again, it is also the rule that "an extension" within this section "may include construction across and at right angles to the original track," nor is it "necessary that the extension should begin at one of the termini or run in the general direction of the original route." *Belle v. Glenville*, 17 Circuit Court Decisions (27 Circuit Court Rep., 181.) Affirmed by the Supreme Court (73 Ohio State Rep., 392 and 397.)

It thus appears that the whole subject matter of the terms and conditions upon which street railroads may be constructed and extended, and their grants renewed, is committed by general legislation to the discretion of the city council as a continuing power, to be exercised from time to time as in the judgment of the council public interest so requires. The various grants to the appellant and its predecessors, involved in this cause, must be construed with reference to the fact that the whole subject matter is within the discretion of the council subject only to the limitations which we have pointed out. These statutes delegate to the city council a continuing power to authorize renewals and extensions and to fix the terms and conditions of such renewals and extensions; and, among the terms and conditions which the council may so fix, is the period of time during which the rights granted may be exercised, and the only limitation upon its power as to fixing such period of time is, that no grant shall extend for more than twenty-five years from its date. It of course follows that, within the limi-

tation of twenty-five years, the power is expressly delegated under these sections to the city council, not only to provide for the renewal of grants and extension of tracks of street railroads, but also to fix the time during which the road so extended may be operated.

IV.

CLAIM OF APPELLES.

By the ordinance of January, 1904, set forth in the bill, it has been attempted by the defendant city to grant to The Forest City Railway Company the right to take possession of the streets therein described now occupied by appellant, upon the claim on the part of the city, as in said ordinance recited, that the right to operate twelve miles of track, which is part of the general system operated by the appellant, expired on the 22nd of March, 1905. The basis of this claim is, that in 1880 the council passed an ordinance entitled:

> "An ordinance to permit the East Cleveland Railroad Company to extend the Garden street branch of its railway;"

in which ordinance it is provided that the company is authorized to extend the Garden street branch of its railroad from Baden street to Quincy street, along Quincy to the intersection of Lincoln avenue, and to equip and operate said extension and its Garden street branch for the period of twenty-five years from and after the passage of the ordinance. This ordinance, it is claimed, measures the right of appellant upon Garden street, and that, with the expiration of twenty-five years from March, 1880, its rights there terminated.

V.

CONTENTION OF APPELLANT.

The contention of the appellant is, that the whole his-

tory of the Garden street extension, as shown in ordinances set out in the bill, discloses an intention on the part of both the railroad company and the city council to make the right to operate in Central avenue, it being an extension of the main line of the East Cleveland Railroad Company, expire at the same time that the right to operate the "main line" of which it is an extension, shall expire; and that, by virtue of such ordinances, the complainant contends that the right to operate in Garden street did not expire on March 22, 1905, but that on the contrary, the complainant is entitled under its existing contracts with the city, to operate these lines as part of its entire system and in connection with its "main line" until July 1, 1914.

VI.

INTENT AS TO DATE ULTIMATELY FIXED FOR GRANTS IN QUESTION TO EXPIRE.

The court below held the date of expiration to be March 22, 1905 (Record 276). We believe the true intent as to date to be July 1, 1914. It is certainly either this date or July 13, 1913.

We maintain that all questions necessary to the solution of this difference as to date, that is, whether March, 1905, on the one hand, or July 1913 or 1914, on the other, were involved and decided in the cases of *Cleveland v. Cleveland City Ry. Co., supra*, and *Cleveland v. Cleveland Electric Ry. Co. supra*, and that those decisions must in consequence rule the present case. What we mean is, that the contractual elements and relations found to inhere in and to have been created by the local legislation there shown to have been passed and accepted, exist here. They relate to the same system of railway, the difference being only in *situs* of tracks and names of predecessors in title. The same disregard for contractual obligation prevails here that was exhibited there.

VII.

CONTRACTUAL INTENT AS TO 1913.

There are two features of fact which are essential to a right understanding of the present controversy. One is the "main line" of appellant's predecessor in title, the East Cleveland Railroad Company. The other is the precise relation between that "main line" and the tracks now in question.

MAIN LINE.

On February 28th, 1859, appellant's predecessor in title, the East Cleveland Railroad Company, was incorporated for the purpose of constructing and operating a railroad commencing at the intersection of Euclid and Newburgh roads at Doan's Corners in East Cleveland, and running thence westerly into the City of Cleveland and terminating at or near the southwesterly corner of the Public Square.

It will not be disputed that a railroad was constructed and put into operation between these termini. This road, as shown at pages 7, 8, 9, 10 of our statement, has ever since been operated and treated as the "main line" of appellant's predecessor, the East Cleveland Railroad Company. Without stopping to refer in detail to the local legislation on this subject, it will, we think, suffice to call attention to the "main line" as it existed when the motive power thereon was authorized to be changed from animal power to electricity. This "main line" as it then existed, is displayed in black and red double lines on a map opposite page 221 of the Record. On July 13, 1888, an ordinance was adopted permitting such change of motive power to be made on the portion of the "main line" which is displayed in double red lines on a map opposite page 221 of the Record. The ordinance was accepted (Record 221). On May 13, 1889, a resolution was adopted and accepted permitting such change of motive power to be made on the remainder of the "main line" (Record 222). This resolution was passed

in pursuance of the ordinance and made subject to its conditions. By the ordinance, the time during which the electrical equipment should be used, was fixed as follows (page 220):

> "Section 6. The privilege of constructing the electric system and the operation of its lines, as hereinbefore provided, is granted in consideration of the improved facilities hereby contemplated and the large expenditure necessary to secure the same, and shall be in force for a period of twenty-five years from and after the date of the passage of this ordinance upon its main and Cedar avenue lines * * *."

Thus we have the "main line" clearly established and identified; and it is quite as clear, too, that the intent of the council was to extend the term of grant of the "main line" to July 13, 1913. This intent is displayed alike by the ordinance and the resolution aforesaid to extend the "main line" grant to that date.

THE GARDEN STREET LINE (CENTRAL AVENUE) WAS AND IS AN EXTENSION OF THE MAIN LINE.

It was claimed in argument below that the Garden street line was an independent railroad of The East Cleveland Railroad Company and not an extension of its chartered line. That such is not the fact at once appears upon reference to the charter of the East Cleveland company. This charter (Record 259) describes the purpose of the corporation and the line proposed to be built as "*A railroad commencing at the intersection of the Euclid and Newburgh roads at Doan's Corners in said Township of East Cleveland, and running thence westerly to and into the City of Cleveland in said county of Cuyahoga and terminating at or near the southwesterly corner of the Public Square.*" This charter was taken out in 1850, and long prior to the construction of the Garden Street extension. This road had been located through Euclid avenue and Prospect street to the Public Square, and had been for many years in operation. It is therefore apparent that the chartered power

of the East Cleveland company to build a railroad between the termini fixed in its charter had been exercised and exhausted, and that such company, in 1868, under the terms of its charter, was not authorized to build any other railroad than the one which it had so located and constructed and was operating.

As the East Cleveland Company, then, had no chartered power in 1868 to build any such line as this Garden Street line as an independent railroad, we must look for some other source of power and ascertain under what power the construction of the Garden Street extension was made. An examination of the statutes of Ohio discloses that, in 1868, there was no statute authorizing an extension of a line by a street railroad company beyond its chartered termini, but that in 1869 an act was passed which has since become section 2505 of the Revised Statutes. Referring to this act, the Supreme Court of Ohio say, in *Sims v. Railroad Company*, 37 O. S. 568:

> "Up to this time there was no authority vested in the city council to allow street railroad companies to extend their tracks beyond the limits named in their certificate of incorporation. May 7th, 1869, an act supplementary to the act of March 27th, 1866, was passed which in terms authorized such an extension (66 O. L. 140). It reads as follows: 'It shall be lawful for the council of any city or incorporated village to grant permission by ordinance to any person or company owning or having the right to construct any street railroad, to extend their track on any street or streets where the said council shall deem such extension beneficial to the public.' * * *"

This grant of the Garden Sreet extension was made January 14th, 1868 (Record 188), and the extension was to be constructed within twelve months from the date of the grant. It is thus apparent that it was not contemplated that this extension would be built and in operation prior to January, 1869, and we find that on May 7th, 1869, the act of the

legislature just referred to, authorizing an extension beyond the termini named in the charter, was passed.

It is submitted that this act of 1869, authorizing such extension, is as well a ratification of what the council had done just prior to the passage of the act as authority for future action as prescribed in the statute.

The principle we here invoke was recognized by this court in *City Railway Co. v. Citizens Railroad Co.*, 166 U. S. 569. In this case the Court, speaking through Mr. Justice Brown, considered an objection made to the legality of an ordinance authorizing the use of electricity as a motive power, the validity of such ordinance having been attacked upon the ground that there was no legislation at the time of its passage authorizing the use of electricity. Replying to this criticism it is said:

> "At this time there was no law of the State permitting electricity to be used, and it is now claimed that the common council exceeded its powers in authorizing this change to be made. But it seems that, on March 3, 1891, a law was enacted by the general assembly declaring 'that any street or horse railroad heretofore or hereafter organized, may, with consent of the common council of the city, use electricity for motive power.' Conceding, although not deciding, that the city might have exceeded its lawful power in authorizing the change from animal power to electricity, in the absence of legislative authority so to do, we think the act of 1891 should be construed, not only as conferring a new authority upon the city, but as a ratification of what the city had already done in that direction. In view of the large expenditures incurred by the company upon the faith of this ordinance, it is ill becoming the city to set up its own want of power to make it, when such power was directly and explicitly given a few months thereafter."

So, we submit, as to the extension ordinance under which the Garden Street extension was constructed, that the city cannot now contend that such construction was made without authority, but that its legality must be recognized as authorized by the statute of 1869 to which we have referred, which operated as a ratification of what the city council had already done in the direction of authorizing this extension.

And, in passing, we call further attention to the fact that, in *Sims v Railroad Co. supra*, the Supreme Court of Ohio, construing this act of 1869 as to extension, held:

> "A street railroad corporation which owns or has the right to construct a street railroad within a city or village, may, with the permission of the council of such city or village, duly granted, extend its track beyond the termini named in the certificate of incorporation, subject to the provisions of section 2505 of the Revised Statutes as corrected 77 Ohio Laws, 42."

As the authority, then, of the act of 1869, authorizing extensions beyond the termini fixed in the charter, is the only authority which the East Cleveland company could have exercised in the construction of the Garden Street extension, it follows, we submit, necessarily, that the line of track which it so constructed was an extension of its chartered or "main line" within the provisions of the act of 1869. This line, then, upon Garden Street, having been so constructed as an extension of the "main line" under authority of legislative enactment pertaining to extensions of track, all of the subsequent legislative acts of the city to which reference is made in this case, providing for further extensions of the tracks so placed upon Garden Street, must be held to be the exercise, on the part of the council, of the power to authorize the extension of track under section 2505 of the statutes. And the whole course of legislation upon the subject plainly indicates that the council and company at all times understood the Garden Street tracks to be, and they were at all times treated as,

an extension of the "Main Line" of The East Cleveland Railroad Company. There was no sanction in law for their existence except as extensions of the "main line" of the company.

But, if there be still any question as to the correctness of the proposition for which we are contending, all doubt is set at rest when we refer to the action of the council in 1873. The original Garden Street extension intersected the "main line" at the corner of Prospect and Brownell streets. March 25th, 1873 (Record 199), the council authorized the East Cleveland Company *"to lay a double-track street railroad in Ohio Street from their present track to Brownell Street, to Erie Street, and in Erie Street from Ohio Street to Prospect Street, to connect with their main track at this point.*

And this same legislative act directed the company, on the completion of such tracks in Erie Street, to remove and abandon the tracks originally constructed in Brownell Street. By this legislation, the occupancy of Erie and Ohio streets is authorized to the East Cleveland company for the operation of a line upon Garden Street. This could only be done by the council in the exercise of the power of permitting extensions of track as authorized in section 2505. So that, whatever may have been true prior to 1873, at that time the Garden Street line became an extension of the "main line" and intersected the main line at Prospect and Erie streets. In view, then, of the situation at the time of the original construction of the Garden Street extension, and in view of the legislative action in 1873, taken under the express power of the statute permitting an extension of tracks, no one can now be heard to say that the Garden Street line is anything other that an extension of the "main line" of the East Cleveland company.

In addition to these considerations, as already appears from the statement of facts in this brief, the council has uniformly, in all of its legislation, treated the Garden Street line

as an extension of the "main line," and has legislated for its operation in connection with the "main line." And there is not found in the Record any foundation at all for the claim that the Garden Street line has at any time been anything other than an extension of the "main line" of the company.

GARDEN STREET EXTENSION.

The facts embraced in what is known as the Garden street (now Central avenue) branch or extension are the tracks in dispute in the present case. It is important to ascertain the precise physical relation between this so-called branch and the "main line" above pointed out. On January 14, 1868, the council adopted certain preambles and resolutions reciting, in substance, that appellant's predecessor had applied for leave to construct a street railroad from the intersection of Prospect and Brownell streets *"to connect with the main line of its railroad;"* thence along Brownell and Garden streets to Willson avenue and the east boundary of the city; also that the company had filed certain consents of property holders and a bid to carry passengers at the lowest rates of fare. It was then resolved to permit appellant's predecessor to lay and operate tracks along the streets for a period of twenty years, and also, as part of such branch, *"to use and occupy the streets, avenues and public grounds over which its main line is now constructed and operated, westerly from the junction of said road with the main line to its westerly terminus."* (Record 188). Two days later, the company accepted the foregoing in these words: *"hereby accept the grants and permits to construct and operate a street railroad from its main track in Prospect street, etc."* (Record 188).

As before stated, when this action was taken, there was no express statutory power in municipalities to grant the right to construct extensions of street railroads. That power was not given until the year following, May 7, 1869 (66 Ohio

Laws, 140). It will be observed, however, from the language used in the legislation above alluded to, and from the physical connection between the main line and the so-called branch, that the latter was, in truth and in fact, *an extension* of the main line.

Furthermore, as we have shown, on March 25, 1873, the council granted to appellant's predecessor the right to change the connection between its main line and the so-called Garden street branch, by laying double-tracks connecting with the main line at the intersection of Erie and Prospect streets and continuing through Ohio street to Garden street, and requiring it to thereupon remove the old connection at Brownell street (Record 199). This was accepted (Record 200), and the new connection is shown on the plat opposite page 200 of the Record, the double red lines showing the new portion and the single blue lines, in Brownell street, the removed portion. On the same date, March 25th, 1873, the council granted appellant's predecessor permission to lay a second or double-track on Garden street between Brownell and Willson avenue, which also was accepted (Record 200). This additional track is shown in red, parallel with the old track shown in blue on the plat last mentioned.

There can be no question but that these resolutions authorizing the change of connection between the main line and the Garden street branch and the extension in Garden street aforesaid, were authorized and adopted under the statute above cited vesting express power in municipalities to grant the right to make street railroad extensions. It is not important, therefore, further to consider the origin of the Garden street branch, for, as early as 1873, it indisputably became *an extension* of the "main line," and is to be treated precisely the same as if it had been originally constructed in pursuance of express power to authorize extensions to be made.

It is to be observed that the local legislation before alluded to, authorizing the motive power to be changed along

the "main line" did not include the Garden street branch or extension. It is scarcely important enough to state, but the fact is, that the omission was due to the experimental stage of the new motive power at the time of the change along the "main line" and the Cedar avenue branch was permitted, the latter being included only because the power house happened to be located thereon. On March 10th, 1890, the right was given by ordinance to change the motive power along the Garden street extension to electricity (Record 225 and Map opposite, p. 226). This right was in terms to continue *"during the term of its present grant for said Garden street branch."* (Record 225, Sec. 1). It is here, we think, the confusion arose in the court below. It was thought and held that this Garden street extension of the "main line" was something distinct from the "main line," especially in the duration of the right to maintain and operate the extension. We believe the cause of this confusion to have been a failure to observe and give effect to *all* the local legislation bearing upon the extension of time for the grants of the main line and the Garden street extension.

RENEWAL OF 1879.

On September 15th, 1879, the council renewed the franchise of appellant's predecessor along certain streets for a period of twenty-five years (Record 204). Section 1 of that ordinance included that portion of Garden street extension which lies west of the intersection of Erie and Prospect streets and extends over certain streets mentioned in the original establishment of the branch to the business center of the city at the Public Square. The effect of this renewal was consequently to renew a material portion of the Garden street extension. The only alternative of this would be to exclude that portion from the Garden street extension, which would obviously be doing violence to the intention of the parties.

GARDEN STREET RENEWAL OF 1880.

Again, on March 22nd, 1880, the council in terms granted authority to appellant's predecessor to extend its Garden street branch from Baden avenue and Quincy street eastwardly along Quincy to Lincoln avenue, and to *"equip and operate the said extension and its Garden street branch for the period of twenty-five years."* This was made subject to a condition that no increase of fare shall be charged by said company on any part of its said branch or its *"main line" or of said extension by reason of said extension."* (Record 208). We may say, in passing, that this is the ordinance which was litigated in *Hadden ex rel. v. East Cleveland R. R. Co.*, 6 O. C. C. Rep. 318, and affirmed by the Supreme Court of Ohio and approved by this court both *in Cleveland v. Cleveland City Ry. Co.*, and *Cleveland v. Cleveland Electric Ry., supra.* This, too, is the ordinance which the court below held determined appellant's rights.

The effect of these two renewal ordinances, the one relating to the "main line," passed September 25th, 1879, and the one relating to the Garden street extension of March 22nd, 1880, was to extend the terms of all the grants involved, first, to September 20th, 1904, and, second, to March 22nd, 1905, a difference in time of only six months.

ORDINANCE UNIFYING TIMES OF EXPIRATION OF MAIN LINE AND GARDEN STREET EXTENSION.

On February 9th, 1885, an ordinance was passed and accepted empowering appellant's predecessor to extend its Garden street branch from Quincy street and Lincoln avenue along Quincy street to Woodland Hills avenue and to *"equip and operate said extension as a single track railroad with all necessary switches, turn-outs and turn-tables, in connection with*

said branch and its 'main line,' and terminating with the grant for the 'main line.'" The council is here dealing with the subject-matter of the future operation of both the "main line" and the Garden street extension of the "main line;" and, by express provision, this ordinance makes the Garden street extension and the "main line" grant expire at the same date.

This ordinance furnishes conclusive evidence of the intent of council to make the grants for the extensions of the "main line" expire with the grant for the "main line," and so to conserve the joint operation of the "main line" and the extension during the same period of time ,and in order to accomplish this express intention the ordinance under discussion, required, on the part of the railway company, a concession of a few months in the matter of the expiration of its then existing branch upon the Garden street extention, to-wit: a reduction in time of about six months. The ordinances reduce the term of the Garden street extension, which, by ordinance of 1880, expired March 22nd, 1905, to make the grant for such extension expire with the "main line" grant on September 20th, 1904; and, without the consent of the railway company, it would not in this respect have been valid. But, as the record shows (p. 211), the railway company, willing to co-operate in this declared policy of the council to make the extension and "main line" grants expire at the same date, duly accepted this ordinance. So that, by express agreement in 1885, the railway company and the city agree that the Garden street extension shall be operated with the "main line," and its grant for such operation shall expire with the grant for the "main line;" and, as we proceed with our discussion, we shall see that from this time on this declared policy of the council to make the Garden street extension and the "main line" expire at the same date, is consistently followed in every legislative act of the council thereafter in dealing with the subject-matter.

ORDINANCES EXPRESSLY EXTENDING TERM OF GARDEN STREET EXTENSION SO AS TO EXPIRE WITH GRANT FOR MAIN LINE.

As already shown, the grant for the "main line" was by council in 1888 extended to expire July 13th, 1913, and, as we have just pointed out, by ordinance of February, 1885, the grants for the "main line" and the Garden street line were made to expire at the same date, to-wit: September, 1904.

We now direct attention to legislation beginning in March, 1891, from which clearly appears the intention of council again to make the grants for the Garden street extension expire at the same time as the grant for the "main line," namely, July 13th, 1913. This intention is evidenced by express provision of ordinances.

On March 30th, 1891, the council passed an ordinance granting to appellant's predecessor the right to place an additional track in Central avenue, so as to complete a double-track system upon the Garden street line (Record 227 and Map opposite thereto). By section 4 of that ordinance, the right to operate the double-track line so authorized was declared to be *"until the expiration of the grants for the said company's 'main line.'"*

Again, on April 20th, 1891, the council granted to appellant's predecessor the right to lay an additional track on a portion of the Garden street extension in Quincy street (Record 228 and Map immediately following). In section 3 of the ordinance, it was provided that:

> "The right herein granted shall be valid until the expiration of the grants for said company's tracks on said Quincy street east of Lincoln avenue, to-wit: July 13th, 1913."

The first of these last two ordinances required no formal acceptance. The last one did, and was accepted April 23rd, 1891 (Record 228).

The intent of the council expressed in the two ordinances last referred to is clear and unmistakable. It is expressed in language free from any ambiguity; and such ordinances do in express terms provide for and authorize the continued operation of the Garden street extension in connection with the "main line" until the expiration of the grant for the "main line" in July, 1913.

We might well rest this argument upon these two ordinances. The court below decreed that the right to operate the Garden street extension expired in March, 1905. By these ordinances, the city council, in 1891, declare and provide in express terms that the company's rights upon Garden street shall not expire until July 13th, 1913.

But we pass to the discussion of other legislative acts which further elucidate and confirm this clearly expressed intention of the city council.

VIII.

INTENT AS DISCLOSED BY COUNCIL'S CONSENT TO CONSOLIDATION AND ITS ORDINANCE PASSED A MONTH LATER.

The action of council in fixing the terms and conditions of consolidation further evidences the council's intention to extend the grant of the Garden Street extension. On May 29th, 1893, the city council consented to, and fixed the terms and conditions of consolidation of four companies under the name of appellant (Record, page 230 and second Map following). One of these constituent companies was the East Cleveland Railroad Company, then owning and operating the Garden Street extension in connection with its "main line" aforesaid. One of the conditions was to reduce the rates of fare by requiring transfers to be given to and from the several consolidated lines. Another condition was that the con-

solidated company should accept the terms and conditions and agree to perform them, which it did on the same date (Record, page 231). This, of course, compelled the company to operate all the lines as a single system. The dates of expiration of the grants of these companies were as follows: The East Cleveland Railroad Company, 1913; The Broadway & Newburgh Street Railroad Company, 1914; The Brooklyn Street Railroad Company, 1910, and the South Side Street Railroad Company, 1913.

We maintain that the obligation of appellant to operate this consolidated system as an entirety was necessarily accompanied by a corresponding right to do so for the period of the longest grant involved. As if to emphasize this, the company accepted another ordinance, passed July 17th, 1893, permitting it to extend tracks on a number of streets, requiring it to comply with the terms and conditions of consolidation aforesaid; also to operate all of its cars as council might require over the entire length of its various lines and extensions and over a loop provided for; requiring it to operate night cars, an obligation not before imposed; obliging the company, too, in consideration of the grant, to agree that the terms and provisions of the section relating to addition of burdens should apply and be conditions of all the grants theretofore made by the council to the constituent companies or any of them. It was further provided (Sec. 6):

> "This grant shall be in force until the 13th day of July, 1913." (See Record, pages 232-234.)

Manifestly, many new obligations were here imposed and accepted which applied to all of the lines of appellant, including the Garden Street extension. Could anything be clearer, either, than the intention to extend all the grants to a common period, July 13th, 1913?

IX.

CONTRACTUAL INTENT AS TO 1914 AS DISCLOSED BY WILLSON AVENUE CROSS-TOWN ORDINANCE EXTENDING ALL GRANTS TO 1914.

It may be thought not to be important to consider whether the tracks in question are held under a grant extending beyond July 13th, 1913, because that alone would require a reversal of the decree below; but obviously that would not conclude the litigation. When the case of *Cleveland v. Cleveland Electric Ry. supra*, was decided last April, the Court declined to pass upon the question then sought to be raised concerning extensions of grants to 1913 and 1914; but the case, as then presented, differed from the present controversy. The ordinance in that case renewing the present appellant's Woodland Avenue grant to The Forest City Railway Company was based upon the assumption of the city council that the grant expired in 1904. The court below held that it did not expire prior to 1908, and that it was unnecessary to inquire as to 1913 and 1914. The affirmance by this Court was sufficient to dispose of the appeal of the city and its grantee.

But the court below holding here that the grant in question expired in March, 1905, it can make no difference that it also held the renewal ordinance to The Forest City Company to be void, because that ruling, if affirmed, would enable the city, by appropriate legislation, to dispossess the appellant and let the streets out under a new grant. It would, therefore, not be enough in this case, merely to hold that the grant in question did not expire in March, 1905; it would be necessary to determine the date on which the grant will expire. Under all the legislation adduced in evidence, interpretation as to ultimate contractual intent is the only way to test the correctness of the date of expiration adopted by the court below in comparison with the other and later dates fixed by the same council. Indeed, no test can be made of the correctness of the date named in the decree without determining what the true date is.

WILLSON AVENUE CROSS-TOWN LINE ORDINANCE.

As was said by Mr. Justice McKenna, in *Cleveland v. Cleveland Electric Ry., supra,* "THE SITUATION MUST BE KEPT IN MIND." At the time the Willson Avenue cross-town line was provided for and built under the ordinance of February, 1894, the situation was this:

The Cleveland Electric Railway Company was operating a system of railroad known as the East Cleveland lines, including the Garden Street extension involved in this cause; substantially all of its lines intersecting and crossing Willson Avenue. It was also operating the Broadway & Newburgh lines, extending from Newburgh, the manufacturing center of the southern portion of the city, and, as well, the South Side, Wade Park Avenue and Cedar Avenue lines. The Cleveland City Railway Company was operating lines upon St. Clair Street, Superior Street, Woodland Avenue, and also upon the West Side. None of the grants of the Cleveland City Railway Company expired before January, 1908, and none of the grants of the lines of the complainant company expired prior to 1910; and, as respects the Broadway & Newburgh line, its grant did not expire until July, 1914. There was at that time no street railroad service enabling citizens to travel across the city from Newburgh, a manufacturing center, to the Lake shore on the north, also a center of manufacturing industry; and the purpose of the council was to establish a cross-town service upon Willson Avenue which should accommodate a public demand for such service as should enable passengers to travel from the southern to the northern part of the city. And this object it was sought to accomplish by furnishing a line to be operated by the existing companies giving transfers to and from Willson Avenue, so that persons going to Willson Avenue could be transferred to that line, and passengers from Willson Avenue could be transferred, without ex-

tra charge, to any line of the city coming to Willson Avenue, and to secure a second transfer to another line. In order to accomplish this purpose, which confessedly would be one of great public service and benefit, it was necessary that the two companies should unite in a contract in reference to the operation of this line, and of course it was necessary to provide as to the duration of operation; that is, it was necessary to provide in the contract for how long a time the companies should continue to operate this line upon the terms and conditions of the ordinance. The council might have provided that this ordinance should expire and the obligations of the companies terminate in March, 1905. It might have provided for its termination in 1908. It was competent for it to provide any length of time which, in its judgment, was proper, not exceeding twenty-five years; but the period must necessarily be one which would induce the railroad companies to make the large expenditure necessary to execute the proposed purpose. It did determine that the grant should be in force until the 1st day of July, 1914. This grant having been accepted by both of the companies involved, it thereby became a contract binding both upon the city and the companies. If, upon looking into the terms of this contract, it is apparent that it could not be complied with by The Cleveland Electric Railway Company with respect to its Garden Street and Quincy Street lines unless it was permitted to continue the operation of such lines until July, 1st, 1914, then it becomes apparent that the effect of this contract, with its obligations upon the complainant and a corresponding right in the complainant, is such that it is required to operate its system until 1914, and if the council has made a contract with the appellant, the performance of which, upon its part, requires the operation of the system until 1914, it cannot be successfully contended that the city can terminate its right at any date prior to July 1st, 1914. We then inquire,—

WHAT OBLIGATIONS ARE IMPOSED UPON THE CLEVELAND ELECTRIC RAILWAY COMPANY BY THIS WILLSON AVENUE ORDINANCE?

(a) It is required to jointly construct and maintain the tracks, wires, poles, et cetera.

(b) It is required to run through cars on said Willson Avenue between Broadway and the northerly terminus of said avenue, at such intervals of time as the council may require.

(c) It is required to so operate the road with respect to fare that, on payment of one fare, either in cash or a ticket, any passenger shall be entitled, without extra charge, to be transferred to any of the other lines of the company intersecting or coming to Willson Avenue, and have a continuous ride thereon, without additional charge, and, without additional charge, to be transferred from such second line to any other line of the company operating the same which crosses the Cuyahoga River.

(d) It is also required to transfer passengers to Willson Avenue from any of its lines coming to Willson Avenue, without extra charge.

What, then, was the obligation of The Cleveland Electric Railway Company upon its acceptance of this Willson Avenue ordinance, and what were its rights as to operation thereunder? Whatever the obligations and rights were, they were continuing until the 1st of July, 1914, and among them so continuing to July, 1914, was the duty to transfer from Willson Avenue over its entire system of lines, and the further requirement to transfer to Willson Avenue from all of its lines coming to Willson Avenue from other parts of the city. If the right to operate upon Garden Street, which intersects Willson Avenue, terminates at any date prior to July 1st, 1914, from such date it would no longer be possible for the com-

pany to comply with the conditions of this Willson Avenue ordinance. It could not thereafter transfer passengers from Willson Avenue to its Garden Street and Quincy Street lines. It could not thereafter bring passengers over its Garden and Quincy Street lines and transfer them to Willson Avenue. In other words, by the express provisions of this ordinance, the City of Cleveland and The Cleveland Electric Railway Company have contracted that, up to the first of July, 1914, the company shall operate and furnish to the public a service which necessarily involves the use by it, during all of that period, of its system of railway in the City of Cleveland, including the Garden Street extension; and, upon the faith of this contract, the companies have constructed, at very large expense, this Willson Avenue line; the system of transfers and car service has been inauguarted; and the people of Cleveland have, since 1894, received and are now receiving, the benefit of the contract made with reference to this cross-town line. It is not within the power of the city council to impair this contract. It is not within its power to make impossible its performance by the appellant, and necessarily the legal effect of this contract of 1894 was not only to grant to The Cleveland Electric Railway Company the right to continue the operation of its lines to July 1st, 1914, but was to require of it, in contract obligation, that it would so operate its system of street railway. Can it be questioned that, by reason of this contract, the appellant has the right to continue the operation of the Garden Street lines which intersect Willson Avenue, and without the continued operation of which it cannot perform the conditions of the contract of 1894?

With due respect to the learned court below, we submit that the summary manner in which this contention is disposed of in the opinion fails to meet the case. It is said in the opinion (Record, page 76):

> "It is true that, under the provisions of section 6, it is made the duty of the complainant to transfer

> passengers to its Garden street line, but the council could not have intended by so requiring that such transfers be made by the complainant, when the complainant had no Garden Street line, and if it had so intended and had so declared, it would have been invalid."

With due deference, we suggest that the comment of the learned Judge begs the question under discussion; nor is it true, as suggested, that the council was without power to provide for a cross-town line which should involve the operation of the entire system until 1914. On the contrary, as has already been ruled by this Court, the council possessed "comprehensive power" to fix the terms and conditions upon which street railroads might be constructed, operated, extended and consolidated. It was in the exercise of this power that the council provided for the construction of the Willson Avenue cross-town line. It was in the exercise of this power that the council imposed conditions and made requirements with respect to the operation of this cross-town line which necessarily involved the use by the appellant company, until 1914, of its Garden Street extension tracks in order to fulfill the requirements made and exercise the right granted by the ordinance. It is no answer, as suggested by the court below, that the company would be excused from the performance of these conditions upon showing that its Garden Street extension grant had expired. The very inducement and consideration moving to the company to make the expenditure involved was to gain the right to continue the operation of its Garden Street extension, as well as its other lines, for and during the extended period of time. Manifestly, the consideration inducing the railroad companies to build the cross-town line was the right conferred to operate it in connection with its system intersecting the cross-town line.

The chief value of the cross-town line, both to the public and the railroad company, is its operation in connection with the east and west lines of the city; it would otherwise be un-

profitable and of little public utility; hence, it was not only within the power of council to provide, but the exercise of a wise public policy to provide, for the operation of this line until 1914, in connection with all the east and west lines of the system. We submit that, the city having entered into this contract and induced the investment of capital upon the faith of it, and the public having received for these many years the benefit thereof, it is now too late for the city to assert that the contract does not mean what it says in express terms, namely, that the rights and duties involved in the grant so made shall continue until July 1st, 1914.

X.

COMPARISON OF DATES OF EXPIRATION RESPECTING THE SUPPORT THEY DERIVE FROM ALL THE FOREGOING LEGISLATION.

The court below contented itself with two unique theories. It thought that the ordinance passed March 22nd, 1880, permitting appellant's predecessor to extend the Garden Street branch along Quincy street, and

> *"to equip and operate the said extension and the Garden street branch for the period of twenty-five (25) years from and after the passage of the ordinance,"*

was, in spite of all the other acts of council, enough to show that there was no intent to extend the grant further. (See opinion, Record, pages 72-76.) The court next thought that the nature of the power to extend tracks forbade the right to extend the term of the grant therefor beyond the term of the grant previously fixed for operating the tracks designed to be extended. It failed to consider both the power to extend tracks and the power to renew, and so extend the term for operating tracks designed to be prolonged or extended. (See Record, page 76 *et seq.*)

Indeed, the court below overlooked another source of power which resided in the council to deal with the company's main line and this Garden Street extension. Additional to the renewal power was, as before pointed out, the power under section 3443 of the Ohio Revised Statutes

> *"to fix the terms and conditions upon which such railways may be constructed, operated, extended and consolidated."*

The theory of the court below was, as we understand it, that when the council authorized an extension of tracks of the Garden Street extension, it could not, although it confessedly attempted to, fix the term of the grant beyond the date theretofore fixed for the expiration of the grant of the main line. It is not difficult to perceive why, in the exercise of the power alone to extend tracks of an old line, the period of time for operating such new or extended tracks could not exceed the time limiting the grant of the old line. It must have been in this view only that the court below could have indulged in the reasoning and have reached the conclusion stated in this behalf in its opinion; but a moment's reflection will reveal to any one that a city council, possessing two or more sources of power respecting a given subject-matter, may exercise all of them in dealing with the subject. Here were three powers vested in the council. One was to extend the tracks of an old line. Another was to renew the grant of the old line for any period not exceeding twenty-five years. Still another was, as just stated, to fix the terms and conditions upon which any railway tracks may be constructed, operated or extended. There is no language to be found in any statute of Ohio prescribing either mode or particular words to be followed or used in the exercise of any one or all of these three sources of power. Now, when the council, as we have pointed out in our statement of fact and also in this brief, authorized extensions of tracks to be made, for instance, in 1891, in certain streets embraced in the Garden street extension, for the pur-

pose of completing a double track system, it did not content itself with merely sanctioning the construction and operation of those particular portions of track; it also expressly went further and made very important provisions. In the first place, it dealt with the subject of operation, both of the new extension tracks and of the rest of the Garden Street extension itself. It went still further. It declared, in substance and effect, that the newly double-tracked extension should be used and operated in connection with the main line, and it declared that this should continue throughout the life of not merely one, but of all the company's grants for the "main line." It will not do, therefore, to shut our eyes to these other subjects additional to the single subject of permitting extension rails or tracks to be laid. No consideration of such a subject can be said to be complete or sound which does not embrace all of the matters then plainly and clearly treated by the legislative body.

Further to illustrate our meaning with respect to the omission of the court below to consider and give effect to all the subjects before the council, we beg to call attention to the fact that the ordinance of March 22nd, 1880, which the court below held determined appellant's rights, is an ordinance providing for an extension of track upon Garden Street, and, as well, providing for the continued operation of the line as extended under the terms of the ordinance, and providing that such operation of the tracks so extended may continue for twenty-five years. Clearly, if the learned court below was right, such ordinance would be inoperative to extend the grant, because it was an ordinance relating to extension of track, and in which the council was exercising the power to authorize an extension of track; and yet this track extension ordinance was held by the Supreme Court of Ohio to be a legal exercise of power and operative to extend the grant for twenty-five years. The intention of council to deal with the subject-matter of the continued operation of the Garden Street extension in connection with the "main line" is no more clearly expressed in

the ordinance of 1880 than in the ordinances of 1891. In all of these ordinances, the council is exercising the right to fix the terms and conditions upon which railroads may be constructed and operated and their grants renewed, as well as authority to provide for the extension of an existing track.

It is hard to reconcile the opinion of the court below, conceding, as it does, the exercise by the council, when adopting the ordinance of 1880, of its power to extend tracks and its power to prolong the grant for twenty-five years, with the court's denial of such exercise of dual powers by the council when it adopted the ordinances of 1891. As the ordinance of 1880 extended the grant for twenty-five years, so the ordinances of 1891, in language equally clear, extended the period during which the Garden Street extension may be operated so that such operation may continue during the life of the grant for the "main line."

THE VIEW EXPRESSED BY THE COURT BELOW AS TO "TRACK EXTENSIONS" IS IRRELEVANT. EXTENSIONS HERE INVOLVED WERE EXTENSIONS OF THE "MAIN LINE" AND DID NOT EXTEND THE GRANT FOR SUCH "MAIN LINE," BUT EXPIRED AT THE SAME TIME.

It is to be observed, too, that the theory of the court below to the effect that a new grant to extend tracks could not survive the expiration of the old grant is totally irrelevant here, because the grant of the "main line" had been, in 1888, extended in point of time until July 13th, 1913; hence the council did not attempt, when declaring that the grants involved in its legislation of 1891 respecting the Garden Street extension, to prolong those grants beyond the life of the grant of the main line; it merely sought to give to the Garden Street extension the same period of duration that it had already

fixed for the "main line." So that, even assuming the correctness of the court's holding below, that a grant with reference to an extension of track cannot be made for a longer duration than the existing grant of the track which is extended, the court fell into most manifest error in holding that, by reason of this rule, the ordinances of 1891 were inoperative to accomplish that which in express terms the council thereby attempted to accomplish, namely, to provide that the extension therein authorized should expire with the grant for the "main line"; because here council were providing for an extension of the main line of the East Cleveland Company. The grant for the "main line" did not expire until 1913, and, as respects the extension of this "main line," it is provided that such extension shall expire at the same time as the "main line" which is so extended. And that which the council did in 1891, even within the principle announced by the court below, was a valid exercise of conceded power. Furthermore, as said in one of the briefs we filed in the case decided in this Court last April (*Cleveland v. Cleveland Electric Ry.*), the distinguished judge, like our learned adversaries, overlooked the obvious distinction between the purpose of language employed by council, where, on the one hand, it is used only to fix the term of an extension of grant, and where, on the other hand, it is used not only for that purpose, but also in connection with other language showing a purpose to prolong the term of the original grant. It simply begs the question of whether there has been an extension of the term of an old grant, to say that an extension of old tracks cannot be authorized for a longer term than that of the old grant. If the thing done and the end sought by it cannot be accomplished without exercising the power of renewal, then that power is inevitably exerted; for otherwise one must hold an act done to be invalid in the presence of plenary power to perform it. This is especially true of the renewal power, which has no mode prescribed for its exercise. (See last sentence of section 2501 and midway of section 2502 of the Ohio

Revised Statutes as quoted in *Cleveland v. Cleveland City Ry.*, 194 U. S., at page 532.)

We may, we think, with propriety, refer to language used by District Judge Wing in the case of *Cleveland v. Cleveland Electric Ry., supra,* when that case was determined by him in the court below, for it shows that that judge did consider all the sources of power residing in the council. He said:

> "In the contemplation of the parties to this contract, did the time during which the mutual obligations therein assumed were to continue, end in August, 1904, or in February, 1908? So far as the West Side Street Railroad Company was a party to the contract, it became obligated to carry passengers from Gordon Avenue to the eastern terminus of the Woodland Avenue line throughout the term of its franchise. The consolidated company assumed this obligation. *It follows that there was necessarily granted to the consolidated company a right to do the thing which it had obligated itself to do.* (Italics ours.)

But, what is much more to the point is, that when that case reached this court, all the objections and arguments on the part of the court below in the present case, were overthrown. This Court found, from legislation of striking similarity to that adduced here, an intent to extend a shorter grant to the date fixed for the expiration of a longer grant, and also that there was power in the council to carry such intent into execution. Said Mr. Justice McKenna, at page 542, in respect of an Ohio decision there cited,—

> "Appellants concede the authority of that case, but say that the ordinance it passed upon left no doubt of the intention of the city, whereas in the case at bar, considering the provisions of the statutes and ordinances, all intendments must be held to be against an intention to renew the original grant. In other words, the contention is that while 'no set form of words is necessary,' it is yet urged that 'such result can only be effected by apt words evincing a plain

> and unmistakable purpose to make a renewal.' It is not a question of power, therefore, to pass the ordinances, but of the intention of the city in passing them, and the latter we have sufficiently considered."

Can it be, then, that any decision is sound which, like that of the court below, ignores the rules of interpretation as indulged by this Court respecting local legislation, and also the powers found by this Court to reside in the local legislative body?

Let us pursue this a step further. The ordinances passed subsequent to the renewal ordinance of the Garden street extension on March 22nd, 1880, are of the utmost significance, and yet we think it is not too much respectfully to say that they were refined and frittered away in the court below. To illustrate: the ordinance of March 30th, 1891, providing for the extension and operation of a double-track along the Garden Street extension, ordained that the right so granted should continue "*until the expiration of the grants for the said company's main line.*" (Record, page 227.) And one month later, April 20th, 1891, the council empowered the company to place and operate an additional track and so complete a double-track in Quincy Street; and the council further provided that this right to operate should continue

> "*until the expiration of the grants for said company's tracks on said Quincy street east of Lincoln avenue, to-wit: July 13th, 1913.*" (Record, page 228.)

Again, after consenting to the consolidation and so uniting companies having grants expiring at different times, as before stated, and requiring and imposing conditions looking to a continuous operation of those lines as an entirety throughout the life of the longest term involved, the council passed, and the company accepted, another ordinance imposing still further and more drastic conditions than those embraced in the consent to the consolidation, and then expressly declared that the "*grant shall be in force until the 13th day of July, 1913.*" (Record, pages 232-234, Sec. 6.)

Still again, on February 19th, 1894, the Willson Avenue cross-town line was agreed upon by the odinance which, as before shown, in terms exacted the performance of obligations by the grantee companies which could not be done until the longest grant applicable to any of the lines intersecting the cross-town lines had expired; and to show that the council intended this to be done, it expressly provided that the grant should be *"in force until the 1st day of July, 1914."* (Record, page 237.) This is in exact harmony with the manifest purpose of the consent which the council had theretofore given to the consolidation resulting in the formation of the appellant.

What, then, is fairly deducible from this summing up of purposes in connection with the dates fixed, limiting their period of accomplishment? Necessarily 1905 must be excluded altogether, for there are manifestly too many instances of extensions of grants to admit of serious debate as to that year. The only dates remaining are 1913 and 1914. When we consider the scope and object of all the obligations which the companies undertook to perform, it seems to us clear that the date fixed for the expiration of the longest grant, July 1st, 1914, is necessary to the full accomplishment of the ultimate contractual intention of both the city and the companies.

We shall be aided here by employing language of this Court in respect of the purpose of council when legislating in reference to two lines having grants terminating at different periods. As there said by Mr. Justice McKenna (*Cleveland v. Cleveland Electric Ry., supra,* at page 538):

> "Indeed, we think it is clear that the city intended to secure, and did secure for its citizens, valuable transportation facilities and intended to extend that part of the system of railways consisting of the Kinsman street line and its extensions until February, 1908. There can be no other reasonable meaning of what the city did or of the language it used; it recognized the main line, not in one or-

dinance, but in many ordinances, and the purpose was to join the initial grant and its extensions together, and continue it and those combined until 1908. There could have been no mistake in the language used or misunderstanding of it. We might suppose a mistake in one ordinance, but we cannot suppose a mistake in four ordinances. The matters dealt with were important, and it is a reasonable presumption that no provision concerning them escaped attention or was misunderstood. The situation must be kept in mind. The Woodland Avenue Railway Company (successor to the right of the Kinsman street company) operated a road on the east side of the Cuyahoga River. The West Side Railroad Company operated on the West side. They were independent companies and the interchange of traffic between them was obviously a public advantage. This was accomplished by the consolidation of the companies and the ordinance fixing the terms and conditions of the consolidation. By that ordinance, through cars were provided for and a single fare was established 'from any point to any point on the lines and branches of the consolidated road.' This imposed duties on the companies and it also secured to them rights. The grants of the constituent companies expired at different times, respectively 1904 and 1908, and it is contended that by the mere union of the lines, the duties and rights of the companies continued for the longer term. This, however, we are not required to determine."

The learned Justice then reviewed the other grants made, as here, in connection with the subject-matter then under consideration and in elucidation thereof; and then, on page 540, he continues:

"Why break up or risk the breaking up of a union of lines and the interchange of their traffic in a continuous carriage of passengers at one rate of fare? The extension was not for an unreasonable length of time. One of the grants did not expire until 1908, and it was reasonable to continue the other until

> that time. What policy or purpose could be urged against it?"

So we say, why break up the system of continuous carriage for one fare to and across Willson Avenue and to and from all parts of the city to Willson Avenue for one fare, as provided for in the ordinance of 1894? The grants under which this extension was to be operated expired at different times, one running to July 1st, 1914. To extend all to 1914 was not unreasonable involving as it did an extension of but a few years. What policy or purpose can be urged against it?

The application of the reasoning of the learned Justice just quoted to the local legislation adduced here is manifest. That reasoning as completely overthrows that of the court below as if it had been expressly directed against it. It can no longer be rationally urged that the intention of council to exercise the renewal power is not to be gathered from legislation like that now under consideration. Nor can the theory of the court below, touching the nature of the extension power and the inability of council to exercise it in connection with its renewal power, be urged any longer. If we are at all right in this, what can be said in support of the expiration date fixed by the court below, to-wit: March 22nd, 1905? In order to sustain that date, one is compelled to read out of the records of the city council ordinance after ordinance, resolution after resolution, which were plainly adopted for the purpose of prolonging the period of time fixed by the extension and renewal ordinance of March 22nd, 1880. It is not difficult, therefore, in our view, to rightfully eliminate that date. The only difficulty, if any there be, is to determine as between the months of July, 1913 and 1914. We but repeat ourselves when we urge that it is more consistent with the manifest object of the city council to procure a public service which should be both uniform and continuous with respect to the traveling public, rather than a service that would be diminishing and inadequate to meet the public demand, because of the expiration from time to time of grants differing in duration.

XI.

AS TO OTHER ASSIGNMENTS OF ERROR.

We do not consider it necessary to discuss any other assignments of error at least until we receive copies of the briefs of our adversaries upon the cross-appeal of appellees. We think the questions they may wish to present on their appeal will enable us, in shorter space, to state all we wish touching our assignments of error on those subjects.

In summing up our contention, we submit:

(a) The Garden Street tracks involved were, and are, extensions of the "main line" of the East Cleveland Railroad Company.

(b) The grant for the "main line" does not expire before July 13, 1913, and, as we insist, not until July, 1914.

(c) By consistent and uniform legislation, council has provided that the Garden Street extension should be operated in connection with the "main line" and the right to operate expire with the grants for the "main line." This is expressly so provided in the ordinance of 1885, and in two ordinances in 1891.

(d) In 1893 council fixed the terms and conditions of the consolidation forming the appellant. The grants of the constituent companies as then provided expired as follows:

The Broadway & Newburgh Street Railroad Company, July, 1914.

The East Cleveland Railroad Company, July, 1913.

The South Side Street Railroad Company, Oct., 1913.

The Brooklyn Street Railroad Company, January, 1910;

and, as a condition of such consolidation, council required thereafter the operation as an entire system of all the lines of the constituent companies, with through car service and general transfers. In order to comply with these conditions and exercise the right granted to the consolidated company, operation must be continued until the expiration of the longest grant, to-wit: July, 1914.

(e) In 1894, council provided for the construction by this Consolidated Company and The Cleveland City Railway Company of a cross-town line in Willson Avenue, and for the operation of such line in connection with all of the lines of the Consolidated Company, including the Garden Street extension. The operation so required of the Consolidated Company, the ordinance provided, should continue until July, 1914,—this being the date of expiration of the longest grant held by the Consolidated Company. The conditions of this cross-town ordinance cannot be complied with, nor can the Railway Company exercise the rights there granted in consideration of its expenditures in building the line, without the operation of the Garden Street extension to July, 1914.

(f) The City received full consideration for these grants, and the extensions were not for an unreasonable time: only for such time as made the right to operate an extension track expire at the same time as the "main line" of which it was an extension, and permitted operation in connection with

the cross-town line for such period as was necessary to fulfill the obligation and exercise the rights granted in the ordinance establishing such cross-town line.

(g) The right of the appellant to operate the Garden Street extension did not, as decreed below, expire in March, 1905; but by virtue of existing contracts, which cannot be impaired, appellant is entitled to operate the tracks in controversy until July, 1914.

Respectfully submitted,

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